STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE MICHIGAN COURT OF APPEALS

THE VILLAGE OF LINCOLN, a Michigan municipal corporation,

Plaintiff/Appellee,

v.

VIKING ENERGY OF LINCOLN, INC.,

Defendant/Appellant.

Supreme Court Case No.: ***127144***
Court of Appeals Case No.: ***246319***
Circuit Court No.: ***00-10619 CE(K)***

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VIKING ENERGY OF LINCOLN, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS APPLICATION FOR LEAVE TO APPEAL

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I. INTRODUCTION

Viking Energy of Lincoln, Inc. ("Viking") files this Supplemental Brief in response to the Court's Order dated October 6, 2005, which directed briefing of the three specific issues set forth below. Viking relies on and incorporates in this Supplemental Brief its Application for Leave to Appeal and its Reply Brief previously filed in this proceeding.

The underlying case centers on the Village of Lincoln's (the "Village") efforts to enforce its Ordinance 96-2, and its assertion that a property owner is precluded from making a facial attack on the validity of the ordinance even when (1) the Village first attempted to apply the restrictions of that ordinance several years after its adoption, (2) there is no evidence that the lapse of time has prejudiced the Village, and (3) that there has been no evidence of reliance on the ordinance. While the facts of the case are presented in Viking's Application for Leave to Appeal, those facts relating specifically to the issues addressed in this brief are summarized below for ease of reference.

II. QUESTIONS PRESENTED BY THE COURT

This Supplemental Brief addresses the following issues specifically raised by this Court:

1) Is the issue of whether Ordinance 96-2 was properly enacted moot?

2) Does the doctrine of Jackson v Thompson-McCully Co, 239 Mich App 482 (2000) (per curiam), lack meaningful standards for consistent application, and is it consistent with the City and Village Zoning Act, MCL 125.581 et seq.?

3) Has Viking abandoned the procedural challenge to Ordinance 96-2 by failing to raise it pursuant to MCL 125.585(11)?

III. SUMMARY OF RELEVANT FACTS

The case arises out of efforts of the Village to control the type of fuels that Viking may burn in its electrical generating plant in Lincoln, Michigan. The Lincoln Village Council attempted to adopt its Ordinance 96-2 in February 1997, and, by that ordinance attempted to freeze the mix and type of fuels that Viking may burn to those that the State had permitted the plant to use at that time. Ordinance 96-2 also imposed setbacks on the plant and its fuel storage pile and identified the plant as a non-conforming use.

The Village's adoption process was fraught with mistakes and violations of the City and Village Zoning Act and the Village's own Zoning Ordinance. Those violations are fully set forth in the Application for Leave to Appeal and summarized in Table 1 below:

Table 1: Comparison of Procedural Requirements and Village Action or Lack of Action

Requirement	Village's Action
MCL 125.584(2) requires a tentative report from the Planning Commission to the Village Council concerning the proposed ordinance.	No such tentative report was submitted to the Village Council.
MCL 125.584 requires the notice of a public hearing concerning the proposed ordinance before the Planning Commission.	The notice given was for a meeting to be held before Village Council. The Planning Commission ultimately held the meeting (with no change in notice).
Zoning Ordinance § 7.3.2. requires that the Village Council hold a public hearing before adopting an amendment ordinance (Ordinance 96-2 amended the Village of Lincoln Zoning Ordinance).	The Village Council did not hold a public hearing on Ordinance 96-2.
MCL 125.584(5) requires a 2/3 vote of the Village Council to approve an ordinance subject to a protest petition.	Only 4 of 7 (less than 2/3) of the Village Council members voted to approve Ordinance 96-2, although all 7 of the members were in attendance at the meeting at which the vote was taken.

Viking brought these mistakes and violations to the Village's attention immediately after they occurred through letters to the Village Counsel, but the Village ignored Viking's notices and purportedly adopted Ordinance 96-2 anyway, in violation of the requirements of both the

City and Village Zoning Act and the Village of Lincoln Zoning Ordinance. Several of the earlier violations were also the subject of a Notice of Appeal filed with the Village's Board of Zoning Appeals.

In 2000, Viking received a revised air permit for its facility from the Michigan Department of Environmental Quality ("MDEQ") and began to burn a fuel mixture different than that mandated by Ordinance 96-2. The Village filed a complaint in the Circuit Court of Alcona County in which it contended that Viking was in violation of Section 6 of Ordinance 96-2 regulating fuel mixture. In response, Viking argued to the Circuit Court in its Motion for Summary Disposition that, inter alia, the entire Ordinance 96-2 was invalid as a result of the procedural flaws in the ordinance adoption process and, in addition, that the Village's attempt, through Ordinance 96-2, to regulate the plant's fuel use mixture was unconstitutional based on due process and equal protection grounds.

The Circuit Court held, in an opinion dated December 13, 2002, that Ordinance 96-2 violated the due process and equal protection clauses of the Michigan and United States Constitutions and invalidated the entire ordinance on those grounds. The Circuit Court further held that Viking was not precluded by public policy or time from bringing its challenge to the procedural flaws in the adoption process but declined to rule on the statutory issue.

The Village appealed the Circuit Court's decision. On August 24, 2004, the Court of Appeals upheld the Circuit Court's rejection of the Village's fuel restrictions on the basis that Section 6 (the fuel mixture provision) was unconstitutional as applied. The Court of Appeals reversed that portion of the lower court's decision relating to the remaining provisions of Ordinance 96-2, and rejected Viking's argument that the entire ordinance was invalid due to procedural flaws, holding that Viking's procedural challenge was "barred as a matter of public

policy." Ct. App. Op. at 4 (Appl. Ex. 1).[1] Viking then filed an Application for Leave to Appeal to this Court in order to appeal that part of the Court of Appeals' decision that rejected Viking's argument that Ordinance 96-2 was void for failure of the Village to comply with several procedural requirements during the adoption process. Viking agreed with and therefore did not appeal the Court of Appeal's holding that Section 6 of Ordinance 96-2 was unconstitutional and invalid.

IV. ARGUMENT

A. Viking's challenge to Ordinance 96-2 is not moot because the setback and non-conforming use provisions of the ordinance apply to Viking and will continue to be applied to Viking, unless the Court invalidates the entire Ordinance 96-2.

The general rule is that the Court does not "entertain moot issues or decide moot cases" and requires that there be more than "abstract questions of law which do not rest upon existing facts or rights." School Dist v Kent County Tax Allocation Bd, 415 Mich 381, 390; 330 NW2d 7, 11 (1982); Gildemeister v Lindsay, 212 Mich 299, 302; 180 NW2d 633, 634 (1920). In this case, Viking is currently subject to a portion of an invalidly adopted ordinance that can negatively affect its operations.

The Viking plant conformed in all respects to the Village's industrial zoning ordinance until the Village adopted Ordinance 96-2, which declared that the only fuel burning facility in town, the Viking facility, was a non-conforming structure and use. The Village intended that the ordinance make Viking's facility a non-conforming structure by imposing new and unrealistic setbacks and fuel storage requirements that were unrelated to protecting health, safety, and welfare.[2] The Village injured Viking by declaring its facility and the use of its facility to be non-

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[1] Viking Energy of Lincoln's Application for Leave to Appeal, filed October 4, 2004 ("Appl.").

[2] A structure is non-conforming when, as here, it does not comport with setback and other development regulations.

conforming. By making Viking non-conforming property, the Village has restricted Viking's freedom to grow and expand or even make routine additions or improvements to the property. Eveline Township v H&D Trucking Co, 181 Mich App 25, 29; 448 NW2d 727, 728-29 (1989). The intent of zoning law, in part, is to eliminate gradually non-conforming property. The Village made Viking's property structurally non-conforming by purporting to limit the location of the Viking plant and its fuel storage pile to be no closer than 1000 feet from hospitals, schools, day care centers, clinics, churches, nursing homes, and occupied residences. Ordinance 96-2 §§ 3, 4 (Appl. Ex. 26). In addition, the ordinance provides that fuel storage piles must be on concrete pads and may not exceed 40 feet in height. Id § 5.

The Village could cite Viking for impermissibly expanding a non-conforming use if Viking, for example, out of necessity, had to increase the height of its storage piles in excess of the ordinance's limits. The Circuit Court invalidated Ordinance 96-2, including the 1000-foot set-back provision, because no evidence existed that the setback and storage pile requirements were necessary to protect the health, safety, and welfare of the Village citizens. Trial Ct. Op. at 12 (Appl. Ex. 25). Notwithstanding the Circuit Court's invalidation of the ordinance on constitutional grounds, the entire ordinance is also invalid because of procedural improprieties that are discussed in detail in Viking's Application for Leave to Appeal.

Viking's challenge to the procedural irregularities is not moot, therefore, because the ordinance's invalid setback provisions, fuel pile limitations, and declaration that Viking's property is non-conforming is still a live issue that continues to interfere with and threaten Viking's continued and lawful operations.

B. The doctrine of Jackson v Thompson-McCully Co does not have meaningful standards for consistent application, and it should be limited to factual situations that are similar to those of Jackson.

The doctrine of Jackson v Thompson-McCully Co, 239 Mich App 482, 494, 608 NW2d 531, 538 (2000) (per curiam), is that a challenge to the validity of the enactment of a zoning ordinance on procedural grounds may be barred by laches "where the passage of time combined with a change in condition make it inequitable to enforce a claim." Id. Two standards make up the doctrine that the Court of Appeals applied in Jackson. Those standards are (i) that there has been substantial passage of time between the rezoning or ordinance adoption and the challenge, and (ii) that there has been heavy reliance by the parties on the rezoning or ordinance adoption. Id. Both of the standards must be met for the Court to bar a challenge to an improperly adopted zoning ordinance as untimely.

The Court of Appeals has applied this somewhat elastic doctrine in the line of cases beginning with Northville Area Non-Profit Housing Corp v City of Walled Lake, 43 Mich App 424; 204 NW2d 274 (1972), leave to appeal denied, 389 Mich 768 (1973), and including Jackson. It was in Northville that the court first articulated what it described as the "public policy" exception to the general rule that an improperly enacted ordinance is void.[3] Id at 435; 204 NW2d at 280.

In Northville, the City argued that its own zoning amendment was invalid because the City Clerk allegedly failed to publish notice of the hearing on the proposed zoning amendment. The Northville court rejected the City's argument for several reasons, among them the fact that

[3] The description of the Jackson doctrine as a "public policy" exception is a misnomer because, in reality, the court merely applied the equitable doctrine of laches in a situation where no legal statute of limitations otherwise applied to bar the stale challenge and the equities were on the side of the developer.

the developer had relied to its detriment on the ordinance amendment by purchasing property and securing a loan for construction of a development on that property. The key concern in Northville was that an ordinance should not be voided for procedural irregularities when there had been a *delay* of four years in the challenge to the ordinance and *during that delay parties acted to their detriment in reliance on the public records* (note that these are the two standards also espoused in Jackson). The Court found that it would be inequitable to disturb settled real estate transactions based upon a procedural defect in the ordinance given the passage of time and the reliance on the zoning amendment by the developer. Id at 435; 204 NW2d at 280.

The Court of Appeals' decision in Jackson was based on similar considerations. In Jackson, a property owner purchased property to be used for an asphalt plant. The property was located in Blackman Township bordering the City of Jackson. One of the conditions of the purchase was that the property be rezoned from agricultural use to light industrial use. The Township rezoned the property in 1987 and Thompson-McCully subsequently purchased the property. One year later, the property was again rezoned, this time to heavy industrial use. Notices for the rezonings were provided to Township property owners within the vicinity of the proposed plant, but not to City of Jackson property owners. Jackson, 239 Mich App at 486; 608 NW2d at 535.

More than nine years after Thompson-McCully purchased the property and began its improvements on the site, the City of Jackson filed suit against Thompson-McCully and Blackman Township challenging the rezonings. The Court of Appeals in Jackson took into consideration that the Township officials and residents of the Township had relied upon the rezonings undertaken in the late 1980s and had acted in accordance with those rezonings. Id at 493; 608 NW2d at 538. Specifically, the Court of Appeals noted that the rezoning was a

condition of the original purchase and that over the years, Thompson-McCully had spent a considerable sum in developing its asphalt plant. The court found that it would be inequitable to allow the City of Jackson to challenge the rezonings when a long period of time had passed and when Thompson-McCully had clearly relied on the rezonings.

Under the Jackson doctrine, the quantum of time that must pass is not specified. Nor is the extent of reliance. In this sense, Jackson lacks meaningful standards. Viking acknowledges, however, that the Jackson doctrine is not unique to this class of cases, but is the application of the equitable doctrine of laches to procedural challenges of zoning ordinances, which this Court also has recognized. See Township of Richmond v Erbes, 195 Mich App 210; 489 NW2d 504 (1992), overruled on other grounds, Bechtold v Morris, 443 Mich 105; 503 NW2d 654 (1993). Even assuming that the Jackson doctrine has meaningful standards, however, the problem with applying the Jackson or Northville analysis to the Viking case is that neither of the standards is met in the Viking case. There is no evidence that Viking, or any other party, has relied on Ordinance 96-2.[4] In addition, there is ample, uncontroverted evidence of procedural flaws in the adoption process for Ordinance 96-2, flaws that Viking brought to the Village's attention immediately during the ordinance adoption process. Viking did not delay in voicing its objections to the ordinance and there was no evidence of detrimental reliance on the invalid ordinance. Letters from Daniel K. Slone, Esq., on behalf of Viking, to David Cook, Esq., Village Counsel (Dec. 2, 1996 to Jan. 22 1997) (Appl. Ex. 29).

Neither Jackson nor Northville stands for the proposition that Viking is precluded from challenging Ordinance 96-2 where Viking can and has demonstrated procedural defects in the ordinance and none of the elements of laches is present. Nor is there any basis for extending the

[4] The Court of Appeals can not find that passage of time alone, without a demonstration of detrimental reliance and prejudice, is sufficient to bar a procedural challenge to the ordinance.

Jackson doctrine to the facts of this case. No properly cognizable public interest would be served by doing so.

Rather than applying Jackson, Viking urges this Court to apply its own decision in Castle Investment Co v City of Detroit, 471 Mich 904; 688 NW2d 77 (2004) to this case. In the Court of Appeals' decision, Castle Investment Co v City of Detroit, unpublished per curiam opinion of the Court of Appeals, No. 224411 (March 19, 2002) (2002 WL 433164 (Mich App)) (Reply Br. Ex. 1)[5], rev'd and remanded, 471 Mich 904; 688 NW2d 77 (2004), that court affirmed the trial court's dismissal of a complaint challenging Detroit's building ordinance on procedural grounds. The Court of Appeals applied the Northville analysis and reasoned that because the ordinance "had been in effect and relied upon by defendant for 22 years" that "public policy" mandated dismissal of the Plaintiffs' claim. Id at *3-4. The Court of Appeals recognized that the application of the laches doctrine to estop a procedural challenge to an ordinance requires evidence of both a delayed challenge to the ordinance *and* a change in position in reliance on the ordinance, and that delay alone will not justify the application of the laches doctrine. Id at *2-4. But, the Court of Appeals erred by finding that the City had established both delay and prejudice as a matter of law. This Court reversed the Court of Appeals and remanded the case. This Court specifically rejected the Court of Appeals' conclusion that the City had met its burden by proving that "the delay in bringing the action resulted in the kind of prejudice that would support a laches defense." Castle, 471 Mich. 905; 688 NW2d at 77.

Similarly, in Viking's case, the Court of Appeals erroneously applied the doctrine of Northville and Jackson to preclude Viking from challenging Ordinance 96-2 on procedural grounds. There is no evidence in Viking's case of either delay or prejudice. There was no

[5] Viking Energy of Lincoln, Inc.'s Reply to the Village of Lincoln's Response in Opposition to Viking's Application for Leave to Appeal, filed Nov. 23, 2005 ("Reply Br.").

evidence to support that the "equitable statute of limitations" had run on Viking's "challenge" to the procedural defects in the ordinance. This Court made it clear in Castle that the City had to establish the element of prejudice to fend off the Plaintiff's claim that the ordinance was invalid.[6] In Viking's case, the Village made no allegations that any parties had relied upon Ordinance 96-2 or that any real estate transactions were undertaken in reliance on the ordinance. The Village relied only on the passage of time to respond to Viking's affirmative defense. Absent such proof of prejudice or detrimental reliance, and absent a lengthy passage of time between adoption of the ordinance and Viking's objections to that adoption, the Court of Appeals erred when it based its decision to deny Viking's affirmative defense to application of the flawed ordinance on public policy grounds.

The Court of Appeals' decision concerning the validity of Ordinance 96-2 based on procedural flaws should be reversed.

C. The doctrine of Jackson is inconsistent with the City and Village Zoning Act because it recognizes a judicially crafted narrow exception to the statutury requirements for ordinance adoption as an equitable method of addressing the passage of substantial time and reliance on improperly adopted ordinances.

The City and Village Zoning Act sets forth specific requirements that must be strictly followed in the adoption of local ordinances. The law is clear that a zoning ordinance is void if the municipality fails to follow strictly the relevant enactment procedures. Krajenke Buick Sales v Hamtramck City Eng'r, 322 Mich 250, 255; 33 NW2d 781, 783 (1948). A zoning ordinance

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[6] Viking did not bring an action challenging the zoning ordinance. Rather, Viking raised the procedural irregularities as an affirmative defense against the Village's application of Ordinance 96-2 to Viking. Once Viking established that the ordinance had not been validly enacted, the burden shifted to the Village to prove that Viking unreasonably delayed raising its affirmative defense and that the Village was prejudiced by the delay by acting to its detriment in reliance on the flawed ordinance. Castle, 471 Mich at 905; 688 NW2d at 77.

that is enacted without following the mandatory provisions of the Act is void and unenforceable. Id.

The Jackson doctrine is a judicially crafted exception to the statutory requirements for ordinance adoption under the City and Village Zoning Act. While the doctrine provides an equitable basis for providing protection where time has passed and property owners have relied on improperly adopted ordinances, the Jackson doctrine is nevertheless inconsistent both with the City and Village Zoning Act, which does not provide any exception to its ordinance adoption requirements, and with the holding of Krajenke Buick Sales that failure to comply renders the ordinance void.

D. Viking has not abandoned its procedural challenge to Ordinance 96-2 by failing to raise it pursuant to MCL 125.585(11).

Viking has not abandoned the procedural challenge to the ordinance by failing to raise it pursuant to MCL 125.585(11) because the Village of Lincoln Board of Zoning Appeals ("ZBA") did not have jurisdiction to act on Viking's claim of appeal regarding the procedural irregularities in the Planning Commission's recommendation to the Village Council to adopt Ordinance 96-2. Additionally, the Village Council committed further procedural errors in its adoption of the ordinance, which happened after Viking filed the petition with the ZBA.

MCL 125.585 concerns the establishment, duties, and judicial review of decisions of Zoning Boards of Appeal. MCL 125.585(11) provides that decisions of the ZBA are final, provided "a person having an interest affected by the zoning ordinance may appeal to the circuit court." In order to address this Court's question, it is necessary to first review the Notice of Appeal that Viking filed with the ZBA and that entity's jurisdiction over that appeal.

Under the City and Village Zoning Act, MCL 125.581 et seq., the adoption and amendment of a zoning ordinance, including the ordinance that establishes the boundaries of

zoning districts, is a legislative act in which, under the clear terms of MCL 125.584, only the planning commission and Village Council may participate.[7] See also Sun Communities v Leroy Twp, 241 Mich App 665, 669; 617 NW2d 42, 45 (2000) ("[Z]oning and rezoning of property are legislative functions.").

The state legislature has conferred on the planning commission the authority and duty to make recommendations for the initial boundaries of zoning districts, the initial regulations that apply in the district, and to make recommendations for amendments to the boundaries of zoning districts and to the text of the zoning ordinance. MCL 125.584(2) & (3). The planning commission has no legislative power to enact ordinances and has no final decision-making power in the adoption or amendment of a zoning ordinance. Although the legislative body may not adopt an ordinance or amendment without first getting a recommendation from the planning commission, nothing requires the legislative body to follow that recommendation. Temple v Portage Twp, 365 Mich 474, 478; 113 NW2d 789, 791-92 (1962).

In its appeal to the ZBA, Viking asked the ZBA to stay the legislative proceeding to amend the zoning ordinance (through the adoption of Ordinance 96-2). Notice of Appeal to the Village of Lincoln Zoning Board of Appeals (Jan. 20, 1997) (Appl. Ex. 23). The ZBA is a body that has no legislative power and limited quasi-judicial functions. See Farah v Sachs, 10 Mich App 198, 206; 157 MW2d 9, 12 (1968). The ZBA had no power or jurisdiction to stay or enjoin that legislative process. Not even this Court has the power to enjoin a municipality from enacting a law, even if a party claims that the enactment of the ordinance is invalid or violates constitutional rights. Randall v Meridian Twp Bd, 342 Mich 605, 607-08; 70 NW2d 728, 729 (1955).

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[7] The Village Council is the municipality's legislative body.

In 1997, as today, the legislature conferred on the ZBA, the jurisdiction to:

- "hear and decide appeals from and review any order, requirements, decision, or determination made by an administrative official or body charged with the enforcement of an ordinance adopted under this act," MCL 125.585(3);
- "hear and decide matters referred to the board or upon which the board is required to pass under an ordinance of the legislative body adopted under this act," id; and
- take appeals in special land use and planned unit development decisions only if provided for in the zoning ordinance. Id.

The ZBA was empowered to "reverse or affirm, wholly or partly, or . . . modify the order, requirement, decision, or determination appealed from." MCL 125.585(9). The ZBA was also directed to "make an order, requirement, decision, or determination as in the board's opinion ought to be made in the premises, and to that end shall have all the powers of the officer or body from who the appeal is taken." Id. The ZBA's appellate authority extended to granting variances and reviewing the actions of administrative personnel charged with enforcing the ordinances that the planning commission and the legislative body enacted. Id.

When the planning commission makes recommendations on legislation, it is not acting in an enforcement capacity, nor is it administering the zoning ordinance. It is simply making recommendations to the Village Council on legislation. The planning commission may act in an administrative or even ministerial capacity when, for example, it reviews site plans. Sun Communities, 241 Mich App at 669; 617 NW2d at 45. The planning commission also may act in an administrative or quasi-judicial capacity, if authorized by the ordinance to be the decision-maker on a special land use application or a planned unit development application. MCL 125.584a(2); MCL 125.584b(2). Even when the planning commission is acting in an

administrative capacity or quasi-judicial capacity, for example, in reviewing a special land use or planned unit development application, the ZBA has no jurisdiction to review the planning commission's decision unless authorized by the zoning ordinance. MCL 125.585(3). The ZBA had no jurisdiction under any circumstances to review the Planning Commission's statutory duties related to recommending legislation to the Village Council, and therefore, Viking did not abandon its procedural challenge to the ordinance by not appealing the Village Board of Appeals' refusal to hear its application to the Circuit Court.

Even if this Court determines that Viking should have pursued the ZBA's refusal to hear Viking's appeal of the Planning Commission's actions, such an appeal to the Circuit Court would have been fruitless because the ZBA had no jurisdiction and the result would be simply that Viking was precluded from challenging the Planning Commission's lack of a tentative report and other missteps pertaining to the Planning Commission identified in the Notice of Appeal to the ZBA. See Table 1, supra at 2. The other procedural mistakes that the Village Council made, three of which are detailed in Table 1, occurred after the filing of Viking's Notice of Appeal to the ZBA. Each of these three additional procedural failures is, in and of itself, adequate to derail the ordinance adoption process and render the ordinance invalid.

It was up to the Village Council to correct the procedural irregularities in the legislation making process. Viking gave the Council notice of the irregularities but the Council chose to act on the Planning Commission's recommendation despite those procedural irregularities. The Village Council then committed additional procedural errors of its own. Viking clearly provided notice of those deficiencies at the time they were made, and, clearly preserved its procedural challenge to the ordinance by properly raising it as an affirmative defense to the Village's

enforcement action that it took against Viking claiming that Viking had violated the invalid zoning ordinance.

V. RELIEF REQUESTED

The Village of Lincoln's Ordinance 96-2 is invalid in its entirety for procedural reasons. For the reasons set forth above, Viking respectfully requests that this Court:

A. Grant Viking's Application for Leave to Appeal;

B. Upon leave granted, reverse that portion of the decision of the Court of Appeals on the issue of the procedural validity of Ordinance 96-2 based on flaws in the adoption process for the ordinance;

C. Enter an Order stating that Ordinance 96-2 is invalid in its entirety; and

D. Enter such other relief in favor of Viking as this Court deems equitable and appropriate under the circumstances.

Respectfully submitted,

Dated: November 2, 2005

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